

ENTERED

June 23, 2016

David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

AARON EARL CARTER, JR.,

TDCJ #01065189,

Plaintiff,

VS.

J.W. MOSSBARGER,

Defendant.

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CIVIL ACTION NO. 3:14-CV-326

ORDER

Plaintiff Aaron Earl Carter seeks leave to proceed in forma pauperis on appeal. For the reasons stated below, Carter's motion (Dkt. 33) is **DENIED**.

Carter filed a complaint under 42 U.S.C. § 1983 arguing that an order discovered long after his conviction indicates that the Texas state court in which he was convicted granted his motion for a new trial (Dkt. 1 at p. 4). He seeks his release from Texas Department of Criminal Justice custody into the custody of the Dallas County Sheriff's Office so that he may be retried (Dkt. 1 at p. 4)—essentially, a conditional order of release unless the State elects to retry him. Habeas corpus is the exclusive remedy for a prisoner who is challenging the fact or duration of his confinement and seeking an immediate or speedier release.

The Court dismissed Carter's complaint pursuant to 28 U.S.C. § 1915(e)(2)(B) as frivolous and for failure to state a claim upon which relief may be granted. Carter's

claims are barred by the Supreme Court's decisions in *Wilkinson v. Dotson*, 544 U.S. 74, 78 (2005); *Wolff v. McDonnell*, 418 U.S. 539, 554 (1974); *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973); and *Heck v. Humphrey*, 512 U.S. 477 (1994). Carter is appealing the dismissal (Dkt. 30).

Carter's appeal from the Court's judgment seeks review of only frivolous issues and is therefore, under the objective test enunciated in *Coppedge v. United States*, 369 U.S. 438, 445 (1962), not taken in good faith. "An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." 28 U.S.C. § 1915(a)(3); *see also* FED. R. APP. P. 24(a)(3)(A).

Even though this Court has certified that Carter's appeal is not taken in good faith, Carter has the right to challenge this finding under *Baugh v. Taylor*, 117 F.3d 197 (5th Cir. 1997), by filing a separate motion to proceed in forma pauperis on appeal with the Clerk of Court, United States Court of Appeals for the Fifth Circuit, within 30 days of this order. *Baugh*, 117 F.3d at 202. However, the Court notes that, because the Fifth Circuit has assigned a docket number (16-40740) to Carter's appeal, the fee discussed in footnote 22 of the *Baugh* opinion will be assessed in this order, regardless of whether Carter challenges the Court's bad-faith finding. *Branum v. Fontenot*, 288 Fed. App'x 990, 991 (5th Cir. 2008); *Williams v. Roberts*, 116 F.3d 1126, 1128 (5th Cir. 1997).

Accordingly, the Court further **ORDERS** that the appellate case docketing fee be taken from Carter's prison trust account in accordance with 28 U.S.C. § 1915(b). Based

on the certified inmate trust account statement provided by Carter, the Court **ORDERS** that:

1. Carter is assessed an initial partial filing fee of \$0.80.
2. Carter shall pay the remainder of the filing fee in periodic installments as required by 28 U.S.C. § 1915(b)(2) until the entire appellate filing fee of \$505.00 has been paid. The agency having custody of Carter shall collect the remainder of the appellate filing fee from Carter's trust account or institutional equivalent and forward it to the Clerk of the District Court in compliance with the terms of this Order.

Pursuant to Federal Rule of Appellate Procedure 24(a)(4), the Clerk of this Court shall send a copy of this Order to the parties and to the Clerk of Court of the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit docket number is 16-40740.

The Clerk of this Court shall also mail a copy of this Order to (1) the Inmate Trust Fund, P.O. Box 629, Huntsville, Texas 77342-0629 and (2) the TDCJ Office of the General Counsel, Capitol Station, P.O. Box 13084, Austin, Texas 78711.

SIGNED at Galveston, Texas on June 23 2016.



GEORGE C. HANKS, JR.
UNITED STATES DISTRICT JUDGE